UNCORRECTED TRANSCRIPT OF ORAL EVIDENCE To be published as HC 1313-xiv

HOUSE OF LORDS

HOUSE OF COMMONS

MINUTES OF EVIDENCE

TAKEN BEFORE

THE JOINT COMMITTEE ON THE DRAFT HOUSE OF LORDS REFORM BILL

DRAFT HOUSE OF LORDS REFORM BILL

MONDAY 23 JANUARY 2012

David Beamish

Graham Allen MP

Robert Rogers and Jacqy Sharpe

Evidence heard in Public Questions 621 - 663

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Members Present

Lord Richard (Chair)
Baroness Andrews
Lord Hennessy of Nympsfield
Lord Norton of Louth
Lord Rooker
Baroness Scott of Needham Market
Baroness Shephard of Northwold
Baroness Symons of Vernham Dean
Lord Trefgarne
Lord Trimble
Lord Tyler
Baroness Young of Hornsey
Gavin Barwell MP
Tom Clarke MP
Ann Coffey MP
Tristram Hunt MP
Mrs Eleanor Laing MP
Dr Daniel Poulter MP
John Thurso MP

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Examination of Witness

David Beamish, Clerk of the Parliaments

Q621 The Chairman: Mr Beamish, thank you very much for coming. I am sorry to have kept you waiting. We had elected quorum problems, if I may tactfully put it that way. You know what this Committee is about, so I do not need to say any more. Would you care, please, to make a statement before we launch into questions? I think that that would be helpful.

David Beamish: Thank you, Lord Chairman, and thank you for inviting me. I am glad to have this opportunity. As the Clerk of the Parliaments, I am the head of the House

of Lords administration, which will be expected to support any transition to a partly or wholly elected House. Obviously, it is not for me to express views on particular proposals for reforming the composition of the House, but there are several practical aspects of the proposals in the draft Bill on which I am glad to have the opportunity to comment. At this stage, perhaps I could flag up three main ones.

First, on the process of transition, I like to think that the House of Lords administration has a good record of responding to whatever challenges are thrown at it, but nevertheless I have to say that I very much hope that the Committee will not be tempted by option 2, under which all the present Members would stay until the third round of elections to the House. The practical problems of accommodating and supporting a House with such a large number of Members during the transition period should not be underestimated, and I have some facts and figures if the Committee is interested.

Secondly, the Bill contains some rather detailed provisions about how the reformed House should operate—for example, some of the provisions in Clause 56, about the expulsion and suspension of Members. At present, the courts and Parliament have a generally good relationship whereby each respects the other's position, and the Committee may want to consider whether there is a risk of the courts being drawn into passing judgment on whether the House has complied in particular cases with provisions in the Bill. That would undermine the principle laid down by Article 9 of the Bill of Rights that proceedings in Parliament "shall not be questioned in any place out of Parliament". On that point, Clause 58 also concerns me—it lists two grounds on

which "the proceedings of the House of Lords are not to be called into question". That rather implies that proceedings could be questioned on other grounds.

Thirdly, Clause 2 seeks to protect the primacy of the House of Commons and the conventions governing the relationship between the two Houses. While the Parliament Acts certainly ensure that the will of the Commons can usually prevail, I have reservations about how effective legislative provisions can be in circumscribing the behaviour of a reformed House of Lords. The White Paper specifically states that the reformed House "would complement" the House of Commons. I think that it would be a pity if attempts to entrench the primacy of the Commons were to detract from ensuring that the two Houses together provided effective scrutiny of the Government and its legislative programme.

Finally, I should perhaps say that, if time does not allow me to cover these or other issues fully this afternoon, I would be glad to provide the Committee with a paper to try to fill any gaps.

Q622 The Chairman: Thank you very much indeed. Perhaps I can start with Clauses 56 to 58. Could you spell out in relation to those two exactly where you see the greatest danger in the courts having the right to interfere?

David Beamish: Clause 56 is headed "Expulsion and Suspension" and goes into various provisions as to how it should work. I suppose that the bit I am most nervous about is subsection (4) onwards. Subsection (8) states: "This section does not apply in relation to Lords Spiritual." I am uneasy about that on grounds of not making things unnecessarily complicated, but that is a minor detail. Subsections (4) to (7) are in

effect about retrospection. They raise the question of whether things that are a ground for suspension happen before or after a set date. That immediately sounds like the sort of thing that might be challenged. On practical grounds it may not be very sensible, because, as the Lords Members of the Committee will know, the House has used its power of suspension. It would probably like what is available to be clearer. This would leave a gap in relation to any conduct before the relevant date. Those are the bits that, by going into detail about what happens within the House, make it look as if an attempt to bring a case to court might well get a hearing. On Clause 58, there is perhaps little more that I need to say, except that by specifying that we cannot question proceedings because of "(a) a vacancy among the members, or (b) the participation of a person who should not be participating" on general legal principles, it hints that other things might give rise to questioning it. These are obviously things that could be tested only when they arose, but the Committee might want to guard against the risk of opening up a field day for lawyers.

Q623 The Chairman: I am not necessarily against that, if I may say so. Can I come back to the primacy point, which you also raised? Could you spell out the practicalities of these proposals that we have been trying to wrestle with—not their merits, but the actual practicalities? Supposing that there were a provision to reduce the suspensory veto under the Parliament Acts to, say, six months. How practical would that be?

David Beamish: It would certainly be practical, in the sense that I am sure that parliamentary counsel could draft something to achieve it. A veto of that length

might be pretty meaningless. A key feature of the present Parliament Act provisions is that you have to have two goes at it and reintroduce the Bill in the following Session, which is quite a disincentive to a Government if the matter to be resolved is only one matter of detail within a big Bill. Presumably a six-month delay would work differently, rather along the lines of what has already happened with money Bills, where if the Bill has not been passed by the Lords within one month, it can proceed straight to Royal Assent. If you did that, first, it would be tempting for a Government who wanted to get a Bill through that they thought would not be popular in the House of Lords simply to send it up and then let it lie fallow for six months and get Royal Assent, which would not be playing the game. In real life, things often take longer than six months. There is an interesting current example. The Scotland Bill had its First Reading on 22 June. We are already seven months since then and we have not gone into Committee yet. I suspect that you will wish to break for a moment.

The Chairman: I fear that we have to.

The Committee was suspended for a Division in the House of Lords.

On resuming—

Q624 The Chairman: Mr Beamish, I was taking you through a number of possibilities and asking you about the practicability of those proposals. You dealt with the one on reducing the suspensory veto to six months, but what about a provision to extend the Parliament Acts to amendments made to Lords Bills in the Commons?

David Beamish: Certainly one could devise a procedure to do that. I suppose that it would look like a provision that if a Bill was sent to the Lords from the Commons in

the same form as the same Bill had previously been sent back to the Lords by the Commons, then it could have Royal Assent against the agreement of the Lords. That would sort of work but I would be very dubious about it. Apart from anything else, this might be an invitation to the Lords, if they saw trouble coming, simply to fail to pass a government Bill at all because the type of provision that I have described would not be able to bite. I think that it might have unforeseen knock-on effects on the way in which business was done and it might be a case of being careful what you wish for.

The Chairman: But everything has unforeseen effects, doesn't it?

David Beamish: As I say, it is workable, but I would just be nervous about whether it might have a different impact from what was hoped for.

Q625 The Chairman: Let us try to make you a bit more nervous: what about a provision to prevent the Lords from rejecting a government Bill at Second Reading?

David Beamish: I have three problems with that one. The first is a practical one. Think how business is conducted. If the question is put, how do you stop it being rejected? If people shout, "Not Content", is the Lord Speaker or her Deputy supposed to say, "Hang on, you are not allowed to say that"? Life is not like that, but even if that could be overcome and you could come up with some satisfactory procedure, it would be easy to find ways round it. Indeed, there are two examples on the Order Paper at the moment. In relation to the Scotland Bill, there is Motion down to be taken at the beginning of Committee to prevent it continuing until this, that and the other have happened. In relation to the Health and Social Care Bill, there is another

amendment down to be taken at the start of Report, again to say that it should not proceed until a certain thing has happened. Requiring a Bill to get past Second Reading would not stop people coming up with nuclear options and stopping it at a later stage. Finally, I mentioned the risk of too detailed provisions inviting the courts to meddle where they have not previously. On the whole, the way in which Bills go through the two Houses is not the subject of legislation. The fact that Bills have a First, Second and Third Reading is not laid down in a statute, and if you start to try to use statute to tinker with the internal processes of considering legislation, that might again have knock-on effects of encouraging the courts to take an interest, which might be undesirable.

Q626 The Chairman: I have one more for you: the provision to replace the power to reject statutory instruments with a power to delay them.

David Beamish: Again, that is perfectly practical. Indeed, it is something that the House could choose to do at the moment. Again, I would caution the Committee that it might have unexpected effects. The House has long been very wary of using the power to reject statutory instruments, although a while ago it agreed to a resolution asserting its right to do so. My worry is that, if you introduced instead a power to delay, because that would be new, there would be no built-in reticence to use it and it might become the norm to try it on, which might actually be less helpful than having a House that tends to bark rather than bite in relation to these things. But in terms of practicality, yes, indeed, it was a recommendation of the royal commission that reported in 2000.

Q627 Ann Coffey: You mentioned in passing something about numbers and I was quite interested to hear your thoughts on that. The proposal is to have a House of 300, but we have also discussed having a larger House of about 450.

David Beamish: My reference to numbers was in relation to the transitional period. If we are looking at what happens after the end of the transitional period, certainly 450 was a number that has been used in the past—I mentioned the Wakeham royal commission and it was in there. In terms of practicality, yes, it could be done. We are coping with a House of 800 at the moment, but it is worth noting that very few Lords Members currently have staff, or at any rate staff based here with desks. If there were to be an expectation of all 450 Members having, let us say, two staff, that might be challenging for us to accommodate in the space we have, but it would certainly be practical in other respects and it would really be for the Committee to decide whether there were enough benefits to justify the extra cost of the larger number of Members. My concern would be if all the present Members stayed while the 450, or indeed 300, elected Members were coming in—we are bulging at the seams in the Chamber as it is. Some calculations have been done concerning provision for Members outside, in particular desk space for them and their staff, with the estate that we have, and even with our present rather modest space standards of 5 square metres per Member—I am told that the Commons have a standard of 12.5 square metres, and that is only for the Member and not their staff—even with 40% of that we have not got the space.

Ann Coffey: Following on from that and looking at the transitional options, simply in terms of numbers and practicality, which is the best option?

David Beamish: We have calculated that we could manage option 1. Option 3, in terms of numbers, would be better still but politically might be less attractive. Options 1 or 3 would both be manageable.

Q628 Lord Trefgarne: Mr Beamish, neither the Bill nor the White Paper makes any claim to change the powers of the new House, particularly as they relate to the House of Commons. Is it therefore not inevitable with an elected or largely elected House of Lords that primacy will be challenged in a way that it is not at present?

David Beamish: It depends what you mean by "primacy". "Primacy" is a term that has recently arrived. When I was Clerk of the Joint Committee chaired by Jack Cunningham nearly 10 years ago, and I think Lord Tyler is the one person who has been a member of both—

Baroness Shephard of Northwold: And Lady Symons.

David Beamish: I am sorry, Lady Symons, too. "Pre-eminence" was the term favoured at that time and this has moved on to "primacy". You can guarantee primacy in the sense that the will of the Commons prevails, both through the Parliament Acts and, more recently, through a couple of other provisions that have given the Commons greater powers: the Constitutional Reform and Governance Act, which has given the Commons a role in relation to treaties, where the Lords only have an advisory role, and the Localism Act, which has given the Commons a role in relation to national policy statements. So you can ensure that the Commons are pre-eminent. If what Lord Trefgarne means is that the—let us say—reticence in continuing to fight its corner that the House of Lords often shows when the Commons take a different view

would not last, that must be a possibility, but I think that Members of the Committee are at least as well able to judge as I am what would happen in practice.

Q629 Mr Clarke: Lord Chairman, I was intrigued when Mr Beamish said that he had some facts and figures. Could you give us a flavour of them, Mr Beamish, if not the whole lot?

David Beamish: Do you mean on the accommodation?

Mr Clarke: No, on your earlier point about facts and figures, which you made at the beginning of your statement.

David Beamish: I thought that that was in relation to the numbers that we could accommodate in the transitional House. At the moment we have 634 desks for Members. In 2015 we would need 735 under option 1, which is more than we have. But, if we go by our space standards, we could squeeze 743 into the space that we have. We have done that sort of detail. Were there any other areas where you thought facts and figures would be useful?

Mr Clarke: No. As I say, I was absolutely intrigued to hear that you had brought them with you.

David Beamish: It was only on the practicality of different transition options that I meant to refer to them.

The Chairman: Is that the total of the facts and figures?

David Beamish: If there are things that people want to ask me about, I might have facts and figures to support them, but there were not other facts and figures that I wanted to bore the Committee with, if I can put it like that.

Q630 Baroness Scott of Needham Market: On the subject of numbers, I was a member of Lord Hunt's Committee when we looked at retirement. We took opinions from across the House as to how one might reduce numbers. Some people favoured some sort of age limit and others favoured looking at how active people were. I wondered whether, from your point of view, you want to comment on ways one might consider reducing numbers, or do you think that that is an entirely political decision rather than a procedural one?

David Beamish: I would much rather not comment on what would be the better option, because, yes, it is very much a political decision. I could perhaps observe that there is a tension between trying to make the numbers fit and keeping on the more active Members. If those who went were purely the less active Members, you would not have achieved so much in terms of the gradual transition, which perhaps demonstrates the difficulty of finding an acceptable formula for doing it. I would say good luck to anybody trying to devise an acceptable formula. For those who were not around in 1999, it is perhaps worth saying that there was an arrangement whereby basically 10% of the hereditary Peers could stay on and there were various complicated voting systems for enabling the Peers to select from among their number. That is perhaps the most practical way of doing it, but it was a somewhat invidious experience, I felt.

Baroness Scott of Needham Market: Can I just press you on that? Looking back at that time and thinking about it with the benefit of hindsight, what conclusions would

you draw from the approach that was taken? Might any lessons be learnt for the future?

David Beamish: I certainly did not feel that they could have done it better, but in any cull like that it is awkward that some people have to go. There is no method that will not be painful. One might observe, although this is fairly trite, that the more clubbable Members tended to do better in the elections. They were better known and there were perhaps some who beavered away behind the scenes whose contribution was less appreciated. I do not have any easy way of ensuring that anything different would happen.

Q631 Baroness Andrews: David, you said specifically that it is important to guard against the risks of these changes. That is what I understood you to say. Can we draw you on the scope of those risks? Specifically, you also said that we should not entrench the powers of the Commons. Can you comment in that context on the appropriateness of the Parliament Act once there is a new House in place? Will that Act, which was created to regulate relationships between an elected and a non-elected House, still have appropriate legitimacy and force?

David Beamish: On the first question, I am a bit reluctant to go further than I have because I think that it is for the Committee to decide what the benefits are and what risks are worth taking. One could probably amend the Bill to make it a bit less susceptible to court intervention. That is probably about as far as I would want to go. On the second part, I do not think that I said that you should not try to entrench the position of the Commons. I was just questioning whether the danger was that you

might try to deal with a House competing with the Commons whereas you ought to ensure that the two Houses are indeed complementary, as the White Paper proposes, so that, between them, they make an effective Parliament and, if you like, make life difficult for the Government in particular in its legislation. On the Parliament Act, the danger is that at the moment that is very much a nuclear option and has been rarely used. It was created for particular purposes but was for many years not used at all. If patterns of behaviour changed so that it became the normal way of getting things through, then that would be a very different Parliament. It would almost certainly not tick my box of being an effective scrutiniser of the Government.

Baroness Andrews: Do you have any other ideas about how that equilibrium could be maintained in this new situation, so as to be as effective as, if not more effective than, the House of Lords at the moment, without running into all these difficulties?

David Beamish: Basically, you set up the two Houses and give them certain powers. What happens after that depends on how they behave. It is probably a question of getting the powers right to get the right balance. My nervousness was at the attempt in Clause 2 to state a principle as if that might somehow affect how Members behave. The way they behave will depend on other things. The Committee has taken evidence on some of that.

Q632 Lord Tyler: To follow on from Lady Andrews's questioning, it seemed from your first statement that you had some misgivings about the extent to which the draft Bill goes into detail in a way that could raise new questions. Am I right in thinking that your approach is that minimalism has its advantages if it is clear?

David Beamish: My concern about detail was not that it would raise new questions but that it might make things justiciable and invite court challenges. That would upset the delicate relationship between Parliament and the courts, which, as I see it, is working pretty well at the moment. It is not so much that it would create more questions as that, if you try to tie down what happens within either House of Parliament in statute, that relationship may be affected. That was my particular concern.

Lord Tyler: I am very interested because that precisely reiterates the expert evidence that we had from your predecessor and the then Clerk to the Commons, back in the Committee to which you have referred, and their very strongly held views against codifying conventions, which we were under pressure to do from the then Government. I was just looking again at that. Lord Hunt of Kings Heath recommended codifying conventions, yet we absolutely unanimously came to the view, and both Houses accepted it, that this was a very unfortunate way to proceed because it set in stone things that would move, change and evolve—and it raised justiciability. Is that a fair summary?

David Beamish: Yes. All I can say is that I certainly support what was said to that Committee and its conclusion.

Q633 Baroness Young of Hornsey: Do you foresee any specific practical or administrative problems arising from having elected full-time Members and part-time appointed Members? Also, referring back to a comment that you made earlier about the Bishops being excluded from a certain provision, again, might there be

consequences arising out of having in effect different terms and conditions for different Members of a reformed House?

David Beamish: On the second question first, that was my concern, although I am not suggesting that in practice they would ever want to throw out a Bishop. However, it seems a bit odd to think that you need to make special provision, which might raise more general questions. Please remind me of your first question.

Baroness Young of Hornsey: My first question was whether you see any practical or administrative issues about full-time and part-time Members.

David Beamish: I do not think that there needs to be, because if you look at the composition of the House over recent years it is a mixture of Members who are here every day and others who come when there are subjects on which they want to contribute. If you go back to pre-1999, there was a mixture of hereditary Peers who had not chosen to be Members but who were here by accident of birth and others who chose to be in the House, and it worked. I suppose that there might be tensions if some Members were salaried and others were not, but that is about merely having some who spend most of their time here. I am a bit suspicious of the term "full-time Members". Members of the House of Commons are salaried, but does that mean that they are full-time? Ministers plainly have other things to do. Indeed, earlier I think that the Chairman was seeking to protect the legal profession by saying that there used to be quite a lot of Members who had a legal practice as well. I am not quite sure what "full-time" is supposed to mean.

Q634 Baroness Symons of Vernham Dean: Mr Beamish, you said that of course it was possible to have statutory provision for Commons primacy, and that is self-evidently there with the Parliament Acts, but they were introduced because it was felt, rightly, that the unelected Lords should not be able to block the elected Commons. If both Houses are elected, does that not take away the raison d'être for the Parliament Acts in the first place?

David Beamish: I would say that that is rather a philosophical question, which is not really for me to answer. Our political system has evolved over the centuries and is not necessarily what one would set up if one were starting again, but it seems to have adapted and to work, so there is no reason why leaving the Lords with the same set of powers as it has now but with a reformed composition should not be workable, regardless of what was in the mind of those who laid down the powers at the time. You may be right, but that does not stop it being workable.

Baroness Symons of Vernham Dean: Do you think, therefore, that there would not be room for something like a reconciliation procedure if there was disagreement between the two Houses? For the sake of argument, in my time we have seen ping-pong for a maximum of, I think, five times returning legislation to the Commons. Would you not see that there might be an argument for introducing a formalised reconciliation procedure between the two Houses?

David Beamish: There certainly could be a reconciliation procedure. I understand that in the 18th and 19th centuries there was a system whereby conferences between the two Houses could be held. It is interesting that, latterly, in practice they became

rather formal occasions when people said what they had to say but there was no real discussion. I find it quite hard to think how such a reconciliation procedure might work in practice. Let us assume that delegations from each House are given either a mandate or the freedom to negotiate and they come up with something. What would happen after that? If it were automatically binding, that would be quite novel in terms of the way the two Houses work. If it had to go back to the two Houses to be ratified, it might or might not work. But as a way of changing the tone, so that we looked at reconciliation rather than one House withdrawing its decision, it might be worth a try. As I say, it has happened before, so it could be practical.

Q635 Baroness Symons of Vernham Dean: Let us leave that one and come back to Lord Tyler's point about the Cunningham Committee report. You said that you agreed with the report where it stated that the conventions should not be codified. Do you also agree with paragraph 61, which says that when any firm proposals are brought forward for the House of Lords to be mainly or mostly elected, the conventions between the two Houses should be revisited? Again, that is something that was agreed by both Houses of Parliament.

David Beamish: It says that they would have to be "examined again". Whether or not they were examined again, it is plain that you cannot be sure that they would stick in a reformed House. Conventions are adhered to, in effect, because everyone wants to make them work. Doubtless, the present understandings—things like the Salisbury convention—would continue to apply while people felt that they were right, but if in

particular circumstances the reformed House felt that it wanted to break out, just by doing so the convention would end.

Baroness Symons of Vernham Dean: Excuse me, but that is not what it says. It says, "should any firm proposals come forward". It does not say when the House has been elected; it says when "any firm proposals come forward". My simple question is this. Do you agree with that proposition or do you not? I am not clear whether you do or you do not.

David Beamish: I think that what it is implying is that the application of the conventions to a reformed House would have to be looked at rather than that the conventions would have to be reconsidered pre-reform.

Baroness Symons of Vernham Dean: It says when they are brought forward, Mr Beamish. It does not say anything about when they are in place. It refers to "firm proposals". Those are what we have in front of us and, after all, both Houses have agreed to them. You were very ready to accept Lord Tyler's point. I am asking if you are as ready to accept paragraph 61.

David Beamish: I suppose that I disagree with it on a point of detail. It states that, "the conventions between the Houses would have to be examined again". Plainly they do not have to be examined again but, on the other hand, if you do not revisit this, the conventions may well come unstuck once you get there.

The Chairman: Three Members of the Committee want to ask questions. That will take us to the end of Mr Beamish's evidence.

Q636 Tristram Hunt: On the question of full-time as against part-time Members, could you see a successful, reformed House of Lords continuing to operate with its membership on a de facto part-time basis, as it has done previously?

David Beamish: Certainly, yes. As I have said, we already have Members who devote different portions of their time to their membership. That seems to work. If you take the continuation of Bishops, by definition they have other jobs to do, so recent history suggests that that system could work perfectly well.

Tristram Hunt: With your great experience of their Lordships' House, do you in all frankness regard it as a full-time job?

David Beamish: It can be for those who want it to be, but it does not need to be. I think that you will find plenty of other second Chambers around the world where most Members are not full-time, so I certainly would not accept that it has to be full-time.

Q637 Tristram Hunt: The tenor of your evidence so far suggests a helpful malleability about change. Obviously, some potential options for change are more manageable than others. On the broader shift between the Chambers, would you generally align yourself, to the extent that you can, with the Minister's view that the British tradition on constitutional change of adaptation generally succeeds?

David Beamish: That has certainly worked historically with the House of Lords. I am trying to think what the consequences would be of simply agreeing with your remark, and where you are leading me. However, generally the answer is yes.

Tristram Hunt: Past experience suggests that?

David Beamish: Yes.

The Chairman: Baroness Shephard?

Baroness Shephard of Northwold: Baroness Symons explored all the questions that I wished to ask.

Q638 Lord Hennessy of Nympsfield: David, you covered a range of possible consequences. Finally, could you rank them on a numerical basis in your hierarchy of anxieties? Also, I am sure that there lurks in your distinguished breast an anxiety that you have not yet come out with. Perhaps you could finish off with that.

David Beamish: That is very kind of you. I tried to mention those things in my opening statement. I suppose that, as head of administration, top of my list of anxieties has to be my first point: the handling of the transition. If we went for option 2, the practicalities of supporting it would be a challenge for the administration.

Looking to the longer term, probably my concerns are in the order that I spoke about them at the beginning. The inclusion in the Bill of elements that would invite legal challenge might make life difficult in future. My third point, which was about entrenching primacy, was really more a philosophical point that the provisions in Clause 2 might not achieve very much rather than that they were dangerous in themselves. That would be my order of listing, but I was simply trying to flag up some things that the Committee might want to think about rather than to tell Members what the answers to the questions should be.

Lord Hennessy of Nympsfield: What is the lurking anxiety, if there is one?

David Beamish: I do not think that I have a lurking anxiety. I suppose that I have always prided myself on being able to deal with whatever is thrown at me. There is nothing about which I think, "If this happened, we would be in trouble". Perhaps this relates to my answer to Mr Hunt: one can normally adapt.

The Chairman: Thank you very much indeed, Mr Beamish, for coming. That was a terribly useful session. I am sorry that it was so delayed by the vote and all the rest of it.

David Beamish: Do not worry—and if anyone thinks of further questions or specific facts that they need from me, they should feel free to let me know and I will provide a paper.

Examination of Witness

Graham Allen MP, Chair, Political and Constitutional Reform Committee

Q639 The Chairman: Mr Allen, thank you very much indeed for coming. I welcome you to this Committee. You know what we are we are about and what the issues are. I wonder whether you would care to make a statement, please, before we actually get down to the questioning.

Graham Allen: If I may, Lord Chairman, I would like to talk a little more about opportunities, rather than anxieties and risks, around two key things—principle and practice—and trying to wed the two together. From my point of view, my principle—and I speak as an individual rather than on behalf of my Select Committee—is that any political power can be exercised only by those who are legitimately elected. That is my ultimate principle. It is one that applies to Commons' Members and to local government councillors and I think ultimately we must aim to make it apply throughout our constitution.

However, there is the little question of practice: how we get from where we are at the moment to where many people who regard themselves as democrats, of all political parties, would like to be. In terms of the practice, you have one set of proposals in front of you from Government, which is a way of making progress to that, and I would support those. The timing, I think, should be a matter for both Houses together to work through, as indeed should many of the questions of detail.

I hope, Lord Chairman, that whatever you come up with you do not rely on square footage as one of the main arguments not to press forward and progress. That would probably not be particularly well received out there among members of the public. Given that we had at least one of the Chambers bombed during the war, I think that we can all find ways of carrying on our business despite the upheaval of the interference of the ballot box.

To be helpful, Lord Chairman, I have come up with a slightly different option, which may appeal to some colleagues, particularly colleagues in the second Chamber, and it is what I call the vegetarian option. I call it that because it means that turkeys can vote for Christmas. I do not mean that disrespectfully. I mean that those people who are currently in the second Chamber perform a great service—even, indeed, in the debates that I understand you have just voted on moments ago. A very important public service, regardless of the way in which the votes go, was performed today and on many, many other days. There is great expertise there and many would feel that we would not want to lose that and certainly would not want to lose that in one fell swoop for the sake of changing the composition of the second Chamber.

I think that there is a way forward, which is to have an elected element of some size that reaches towards the principle that I outlined initially—the principle of having a fully elected second Chamber at some point, so that the political power is exercised by those who are elected. But it is an effort to say that there is more than one way of skinning this cat or turkey, whatever you care to say.

Then there is the question of primacy. I have been a Member of Parliament for 25 years and it has never been my experience that the first Chamber has primacy. It may have primacy of some description over the second Chamber, but what we have in our system, since we do not have a pluralist system or an effective separation of powers, is the primacy of Government. We have Executive sovereignty. I think that there is an opportunity again here for those of us in the first and second Chambers to work together more effectively to do what Gladstone said of the role of the House of Commons, which is not to run the country but to hold to account those who do. I think that in a sense the institution that we need in order to work together to progress our mutual interests—the institution that we need to worry about and have continuing anxieties about—is Government and making sure that we are effective in carrying out our role.

Then there is the issue that occasionally gets raised in the context of primacy, which is that somebody has got to win. Virtually no western democracy thinks like that. You can have independence within your institutional settlement, and it works, provided that you have reconciliation. An effective process of reconciliation can be found in almost every other democracy. The second and first Chambers working together could quite easily come to have common custom and practice on reconciling their views and I think that that would make us stronger in holding Government to account.

Finally, Lord Chairman, Baroness Andrews talked about risks. I think that many risks are facing us now—perhaps some risks that have not faced us in previous times. I am

not necessarily talking about the Union but certainly I think that the first and second Chambers need to look at that particular issue together. Also we must now take much more seriously our role as a legislature, independent from the Executive, so that we can be much more effective economically and globally. A fully functioning, modern democracy will play that part as part of a pluralist democracy with a proper separation of powers.

I end with the word that I began with: "opportunity". There is a great opportunity for us all to move together on this, to argue, to reconcile and to come up with a package that, for the first time, has some part of that principle that the second Chamber, like the first, should contain an elected element.

Q640 The Chairman: Thank you very much indeed. I start by saying that on the square footage argument I was very pleased to hear you say that this was something that both Houses could deal with. It was not an argument that would appeal very much outside, but inside the Palace of Westminster it could be dealt with by both Houses. Might that mean that the House of Commons would think of releasing part of its accommodation for the enlarged House of Lords in the interim?

Graham Allen: I would very much hope that we would work together and find space, whether it is the rifle range or wherever. We knew that we could never have a nursery in the old days because people needed space for this, that and the other. Also, if anyone cares to walk around Westminster, they will see that there are lots of boards outside offering space. If we cannot create effective office space for Members, it will be beyond us to create an effective democracy in this country.

Q641 The Chairman: Thank you. Coming back to the main issues as opposed to those on the sidelines, you state quite forcefully—and I quote you here—"that those drafting these reforms may have unwittingly created a constitutional time-bomb, which will eventually detonate and explode traditional understandings of the relationship between the two Houses of Parliament". Could you expand a bit on that?

Graham Allen: Yes. I think that if progress is to be made and the second Chamber seeks the chance of being part of a modern, pluralist settlement at the legislative level, then, just as we have seen in the case of devolution, there could be, in my opinion welcome, pressure to democratise other levels of our society—for example, in local government. Local government is the creature of central government. Looking at how we could resolve our difficulties and seize the opportunities at this level, I should have thought that, as is commonplace in virtually every western democracy, local government should not be the creature of statute but that it, too, could have its own clear, agreed rights. A broader settlement, perhaps on a federal basis with the nations and regions of the United Kingdom, could be something that people might consider a little more seriously than has happened in the past. If there is a view towards developing a pluralist democracy—not on one day but over a period—then I think that other tensions could be released and other institutional forms which are perhaps based on that word "subsidiarity" could be brought forward.

Q642 Mrs Laing: I am not sure whether I have to declare an interest as a member of the House of Commons Political and Constitutional Reform Committee, of which Mr Allen is the Chairman. I should like to refer our witness to the seventh report of that

Committee, on the outcomes of a seminar on the House of Lords that we held in March 2011. In particular, paragraph 5 of the conclusions and recommendations refers to paragraph 11, which says, "On a similar note, much of the relationship between the two Houses is regulated by conventions, which rely for their effectiveness on the fact that the House of Lords lacks any democratic mandate. The existing conventions governing relations between the two Houses will not survive in their current form if the upper House is given democratic legitimacy, and the Government's proposals need to be examined with this in mind". I wonder, Lord Chairman, whether our witness might like to expand on that issue, particularly looking at primacy. If the House of Lords, or second Chamber, is changed so substantially, is there really any point in having two Chambers that are constituted in the same way and are therefore likely to become mirror images of each other? Would it not be better, cheaper, just as democratic and more efficient to have just one?

Graham Allen: I am a parliamentarian first and my interest is to defend and extend the capabilities of the legislature. That may sometimes be painful for the Executive and the Government. However, two things arise from that seminar, which we both attended. The first is a number of detailed points, such as the questions around retirement and moving things forward, and trying to write down some of the relationships rather than having them as a sort of moveable feast when that is convenient for people. Those sorts of things have been widely discussed and, I understand, widely welcomed.

The second is the question of legitimacy, which is very important. There is almost a sub-question about the legitimacy of parts of Parliament when we compare Parliament with Government or legislature with Executive, and I think that frankly that is the bigger question. To deal with that directly, Mrs Laing, I think that both Houses can be legitimate but, until an evolution takes place—and I think that I shall be long gone from this place when it happens—it is perfectly acceptable for the second Chamber to have a legitimacy but not one that makes anybody anxious, to use the word that I have heard in the Committee today. I am talking about a degree of legitimacy. If the Members were elected for a 15-year term or elected in thirds or through STV, I believe that the second Chamber would be less legitimate and the pre-eminence of the first Chamber over the second would be maintained. I finish with the point that our dual interest is to be more effective in the face of the most over-concentrated Executive power in the western world.

Q643 Baroness Scott of Needham Market: I want to ask you to say a bit more about the conciliation mechanisms. It seems to me that they exist but in a rather subterranean way that is a combination of furtive discussions and threats about how many people you can get through the Lobby. How would you envisage such a mechanism being framed and how might it work?

Graham Allen: I must tell the noble Lady that I am a recovering Whip and I take each day as it comes. My experience is that the reconciliation that has taken place—certainly in my time in government—has been between government and opposition. It has not been reconciliation between the Houses. I am not flattering anyone in this

room or anyone in the first or second Chambers but there is undoubtedly great talent, which is often not put to use, in both Houses. Between us, as a legislative interest, we could certainly figure out—perhaps, let us say, with the good offices of a former United Nations ambassador—ways of devising means of moving forward and sorting out problems. Currently we say, "Well, nanny knows best. Somebody up there has to tell me the way to do it. Let me know which way I have to vote, then we can come to a conclusion on this". I do not believe that that is the way a democracy should work. When it works differently, it is abused with terms such as "gridlock", "delay", "ping-pong" or whatever. I do not think that it is beyond our wit to find ways of forming institutional arrangements that allow us to come to an agreed compromise. It is an insult to the intelligence of both Houses for people to say, "We must do it in a particular way that suits Government on every occasion". Again, I would look abroad to other democracies, which have no difficulty with this. Of course they have strongly held views but invariably those views are reconciled. If there is respect for the concept of independence and reconciliation, it is perfectly possible to move forward.

Baroness Scott of Needham Market: Allowing for and setting aside the dangers of trying to apply inappropriate models, which countries in particular with effective arrangements would you suggest we look at?

Graham Allen: I would not look at any; I would make or grow our own. We have some fantastic parliamentary talent in both Houses. It is absolutely open to us to

create an effective mechanism inside both Houses which can produce better law and receive much greater respect externally than is the case at the moment.

Q644 The Chairman: Can I interrupt there? We talk about conciliation procedures. If you think about ping-pong between the two Houses at the moment, it is not between the Houses. I think you made the point that it is basically between the Government, as represented by the majority in the House of Commons, and the Opposition, as represented by not necessarily one party in the House of Lords but sometimes a combination of two parties and, indeed, sometimes the Cross Benches. It is a conciliation procedure which is not legislative but is, frankly, much more with the Executive. Does that strike you as a sensible way to proceed?

Graham Allen: It is very important. It is never, if done effectively, a zero-sum game. It is not the lowest common denominator. I think that those with experience of the law will recognise the frisson when you take things to a higher level by your agreement. You explore other people's view and come to a mutually acceptable view that not just solves an argument but makes better law for people in our country. Equally, as well as having the capability to do this, I think that the electorate are right to expect those very high standards of us.

Q645 Baroness Symons of Vernham Dean: In your paper, which you were kind enough to circulate before giving evidence today, you say that you support the coalition proposals and that even 80% is a big improvement on 0%. You make the point about Members of the second Chamber being put in that Chamber by the

voters. What relationship do you see between the elected House of Lords and the electorate that put them there?

Graham Allen: I think that with the second Chamber the relationship would be less intimate and less legitimate. It would be a matter for both Houses to work out clearly how things could happen and who would be responsible for what. For example, Wales, with a devolved Assembly, very rapidly moved to having effective codification of who does what so that, for example, with a particular piece of casework you do not have people asking someone in the Senedd to do something that a Member of Parliament is doing. I refer to the sort of basic convention in which MPs do not go into each other's territory. Even the question of who should do casework can be worked out very easily by people of good will. Therefore, I think that the relationship would be less strong.

Baroness Symons of Vernham Dean: Why do you say that it is a less legitimate relationship? The whole point of electing the House of Lords is to make it more legitimate in the legislative functioning. Why is it automatically less legitimate? What is the reason behind that?

Graham Allen: It is much more legitimate than currently but not as legitimate as the first Chamber. The reason for that is to put at ease those people who feel that there would immediately be open conflict and war between the two Chambers. A mythology is put about that there will immediately be difficulties between the two Chambers. I am talking about having a properly, or fully, elected first Chamber where the relationship continues—I am not proposing any change there—and a second

Chamber where some of the people have an elected legitimacy but, because of the system to be used, that legitimacy is not as strong as in the first Chamber.

Baroness Symons of Vernham Dean: Did you not give the game away a bit there by saying that, in effect, this is less about democratic legitimacy and more about a comfort zone so that MPs do not feel compromised by somebody else on their patch?

Graham Allen: Yes. Many colleagues are deeply anxious. The Government come along, wave shrouds and make noises in the night, and many of my colleagues run to the nearest warm place that they can find. It is not a matter of giving the game away; I am very open about the fact that, if you are to make a small move towards what I regard as the ultimate position—maybe in many, many years' time—of a fully elected Second Chamber, we need to set everybody at ease and ensure that they are comfortable with that. It is a very significant prize. If we were to accept and move to the elective principle—I do not care whether it is 100%, 85%, 50% or even 10%—in this Parliament or the next, I think that would be a very significant step forward. It would probably be as significant a step as we have taken in over 100 years.

The Chairman: Lady Andrews.

Q646 Baroness Symons of Vernham Dean: Sorry, Lord Chairman, but I had one more point on Mr Allen's evidence to us. I refer to where he says that it will eventually prove necessary to codify the respective powers of the two Chambers to introduce the required clarity to the democratic process. We have been discussing codifying the conventions. Of course, the Cunningham Committee did not want to codify the

conventions because of setting everything in concrete. You seem to be taking a different line here. I wonder at what point you would think it right to have that clarity which you say is so important.

Graham Allen: I am a great believer in writing things down. You do so when arranging your mortgage or joining your swimming club. It is done for everything apart from British democracy. If we are to make people citizens rather than subjects, they need to know who does what, where and when, according to the famous C Wright Mills dictum. If we are all sharing this information and we are working things out and matters are evolving, I do not think that it should be set in concrete. Anything to do with codification is about evolution, but it gives you a basis and a framework. It gives you the boxing ring, not the boxers, in which continual evolution can take place. I believe in writing things down so that everybody knows where they stand. If they do not like it, we can all negotiate and talk to each other as adults.

The Chairman: Do you want it done in statute or just written down as a concordat?

Graham Allen: I do not think that it is for Mr Clegg or me, as the Chair of the Political and Constitutional Reform Select Committee, to make those decisions. I think that we have the brain power to do this so that we can all get along and work these things out. Not doing so will mean that someone else will make the decision on the basis of information that is not shared by everyone else.

Q647 Baroness Andrews: Graham, may I go back to the question of legitimacy, because I am genuinely puzzled by what you said? Are you saying that the value of the vote for someone in the second Chamber is of less worth than the value of the

vote for someone in the first Chamber, albeit that it might well have been done on the basis of proportional representation, which some people argue very strongly is a more legitimate and fairer vote? Are you saying that the mandate is therefore weakened?

Graham Allen: Yes, the mandate is weakened because it is over a longer period; it is not done nationwide on a regular basis. As I understand the current proposal, it would be one-third every five years. Therefore, of course the mandate has less vigour than the mandate for the first Chamber. I am very happy for that to be the case, not least because, again, it reassures those parliamentary colleagues in the other Chamber who feel that somehow their role could be threatened. I think that they are wrong to feel that; none the less, that may be the reassurance that is required. We are talking about practical politics here in order to make some progress.

Q648 Baroness Andrews: I have a second question. You put great emphasis on the argument for a more effective Parliament and for a more independent House of Lords. First, how does this make for a more effective Parliament? Secondly, how does it make for a more independent House when elections will be driven by party-political considerations, no matter how you construct them?

Graham Allen: I believe in the ballot box as the ultimate mandate. It has served the Commons Members of this Committee very well. People have fought for it for many years, and the extension of the franchise must, and will, continue. I am trying to find a way in which it can happen in order that we can help to move forward the whole question of how we reform and modernise our Parliament. Voting is very important

and I think that it would be an added element for the Second Chamber. It would make the Second Chamber more effective because there would be additional people—not people who are better but people who come from a different standpoint and who, at some point, have had a closer connection with the electorate than those who are appointed.

Baroness Andrews: Do you have no issues with a 15-year term in terms of accountability?

Graham Allen: In an ideal world, yes, but this is not an ideal world. It is not a clean sheet of paper. We are trying to make progress. We are trying to move from where we are now to a better place. The elective principle goes way back in terms of my history to when Tony Blair was the shadow home affairs Secretary of State and I worked with him on democratic agenda issues. Actually, the truth of the matter is that I worked with John Smith on those issues, and it was John Smith who drove a lot of this agenda. John's very strong view—and it is one that I did and do share—was that creating an elective element for the Second Chamber would be the most important thing that we could do because of what it would allow to grow and evolve in due course without worry or anxiety, and because the legislature could be strengthened over time.

Q649 Ann Coffey: Graham, if the proposals in this draft Bill were put into a Bill, they would likely meet some quite strong resistance. What do you think about the idea of having a referendum to settle the question as far as the public are concerned?

Graham Allen: From my point of view, that would be another diversion and another delay. It would be another attempt to stop serious reform. Political parties are perfectly capable of putting in their manifestos and putting in front of people what they would like to see on this question and I do not see a referendum as being helpful. However, that is my personal opinion and if, working together, the Lords and the Commons come up with a view that a referendum is important and necessary, I would get on with it and I would hopefully work to get the proposals through on that basis.

Ann Coffey: Do you not think that it is important that the public are given the opportunity to have a clear view on this, rather than to have an indirect view by voting for a particular party's manifesto?

Graham Allen: No. I believe in representative democracy and Members of Parliament taking responsibility. They should make their views known and they should vote accordingly in the House of Commons.

Ann Coffey: But do you not think that a referendum in which the public voted overwhelmingly for an elected or partially elected House would mean that you would stop the arguments that might go on for years between both Houses over these proposals?

Graham Allen: No, I do not. I think that referendums are notorious for being fought on issues other than the question on the ballot paper.

Q650 Lord Hennessy of Nympsfield: I have often seen you in my own mind as Parliament's Large Hadron Collider: you want to recreate the moment of a big bang,

in which we will have the separation of powers between the Executive and the legislature. Today, you mentioned the "federal" word—you want that as well in your Large Hadron Collider big bang. Do you not think that, with Scotland being a first-order constitutional question, I think, compared to this one—not that this is not a big one—we should wait for the Scottish question to be settled before your Large Hadron Collider moment can be given to you?

Graham Allen: No. The "F" word that I think you should apply to me, Peter, is "Fabian"—slow, steady, incremental progress, being willing to compromise and offering a vegetarian option to all the meat eaters of the Committee. What Scotland does is to say, "If you do not take action at the appropriate time", which was 1997, "and if you do not solve the English question at the same time as you try to solve the Scottish question, it will come back and bite you." I think that we have an opportunity now. Lords reform is not a big political topic, whether we like to think that it is or not. This is a moment when there is relative tranquillity. The Lords have not inflicted 20 consecutive defeats on the Government and they are probably not likely to. We are certainly not at a moment of crisis. I think that we are now at a moment when wise counsel can say, "This is a useful moment to come forward with some sensible compromise proposals that get us just a little way forward. Perfection should not be the enemy of the good."

The Chairman: We have a problem. I am told that there is a Division in the House of Commons at 7 o'clock, which is fixed. There is another Division coming up in the Lords, by the look of it. I am also told that after the 7 o'clock vote in the Commons

we will not have a quorum, so I fear that we will have to bring examining Mr Allen to a halt. I apologise to the people on the list who wanted to ask questions. I think that we should proceed with our final witness, the Clerk of the House of Commons.

Graham Allen: Thank you, Lord Chairman. I thank Members and colleagues for their time.

The Chairman: Thank you very much for coming. It was helpful, informative and revealing.

Examination of Witnesses

Robert Rogers, Clerk of the House, and **Jacqy Sharpe**, Clerk of Legislation

Q651 The Chairman: Mr Rogers, thank you very much for coming. You know what the Committee is about. Would you care to make a short statement before we ask you questions? It would be helpful to the Committee to hear your views first.

Robert Rogers: Thank you very much, Lord Chairman. Perhaps I may introduce Jacqy Sharpe, Clerk of Legislation, who sits alongside me. I will begin by saying that the shape and membership of the future House of Lords is of course an intensely political question and not one on which I would venture an opinion. However, as Clerk of the House of Commons, I have views on the possible effects on the House that I serve, and I hope that we can explore these in a moment. Before we do, I will make two general points. I have never been a supporter of the zero-sum game analysis of the powers of the Commons and the Lords. If it is the job of Parliament to scrutinise the mighty Executive of the day and to call it to account, I suggest that the more effective the powers of Parliament as a whole are—I emphasise "as a whole"—the better. My second point is that the relationship between the two Houses is at the moment—and has been for many years—based on what I might call complementarity rather than competition. I think that that takes account of the different parliamentary cultures in each House, and I think that it has great strengths. The proposals in the Bill would change that and I foresee competition arising in particular in three areas: finance, the representation of constituents and the Select Committee system. No doubt we will be

able to explore all three areas in the relatively limited time you have left, as well as perhaps the practical hazards of regulating some of these matters in statute.

Q652 The Chairman: Thank you very much indeed. Well, let us explore them, if we may. We will take the finance provisions first. At the moment, the House of Commons is clearly the initiator and, indeed, the ultimate arbiter of such matters as financial privilege. To what extent is there a shared understanding between the two Houses of matters such as financial privilege, and how would that understanding be affected if the House of Lords were to be elected?

Robert Rogers: I think that there are some misapprehensions about the way in which financial privilege operates. Clearly, a distinction between the powers and the roles of the two Houses is made in the Parliament Acts. So far as the traffic between the two Houses is concerned, I think that there is a misunderstanding between an amendment being made by the Lords to a Bill for which there is already coverage by way of a money resolution or a ways and means resolution in the Commons—when, if the Commons reject the amendment, the reason that they will give is financial privilege—and the more extreme circumstances of the House of Lords sending the Commons an amendment for which it has no authority, either for taxation for the expenditure that it represents. Standing Order No. 78(3) in the Commons requires the Chair—who has no alternative—not to put such an amendment to the House. Those are two very different things. In the first instance, financial privilege is the reason given and it does not exclude a second try by the Lords. The second instance

concerns something for which the House with financial responsibility has not given authorisation. There is a great gulf between the two.

The second part of your question concerned how that would change were the Members of the Lords to be elected. The answer covers a much broader canvas. Perhaps I may put myself—this is an eventuality that I can only marginally imagine—in the position of being an elected Member of the House of Lords. I cannot imagine representing constituents who are taxpayers without feeling that I should have a role in expressing views about the way in which money is being spent. Once you start to pull on that string, perhaps you will end up with the elected Lords feeling that the Parliament Act settlement is asymmetrical and should be changed.

Q653 The Chairman: I will ask you about another financial matter: money Bills. There is a slight mystery about them in the House of Lords. We are never certain what constitutes a money Bill or who can certify one. Can you give us a glimpse of the truth here?

Robert Rogers: Section 1(2) of the Parliament Act 1911, as amended, gives us a description of a money Bill. It is perhaps not irrelevant that my learned predecessor of the day, Sir Courtenay Ilbert, wrote a memorandum in which he attempted to encompass the definition. He was very stroppy with the Lord Chancellor of the day who, he felt, in turning his memorandum into a draft Bill, had made it much more complicated than he had intended in the first place. Money Bills, in terms of practicality, are examined by the Clerk of Legislation. I will hand over to Jacqy to say something about what she does in that process.

Jacqy Sharpe: One would look at any Bill—it is hypothetical at the moment—to see whether it fulfilled the conditions in the Parliament Act. I have on my desk, and will continue to have, a copy of the relevant section of the Act. It would be for Mr Speaker to certify a Bill as a money Bill. He would not consider that until the Bill had been through the Commons, because what might on first appearance look like a money Bill could be altered if other provisions were added by amendment during its passage through the Commons.

Robert Rogers: Having been Clerk of Legislation myself for three years, I should add that parliamentary counsel, as representatives of the Government, address the Clerk of Legislation on these subjects—sometimes quite persuasively. However, something that I can knock firmly on the head is the idea that the Government of the day can decide what is or is not a money Bill. That is decided after due consideration. Advice is given to Mr Speaker and it is a rigorously impartial and detached process.

The Chairman: Presumably your comments about the effect of an elected House on the previous matters would apply also to a money Bill: namely, that elected Members would eventually turn round and say, "Look, this affects my constituents, so we should have power over it."

Robert Rogers: If you revisit the 1911 settlement, it is liberty hall.

Q654 Lord Trefgarne: We are asked to believe—the Minister said this in his evidence and it appears in the White Paper—that if the Bill becomes law, the primacy of the House of Commons will be maintained principally by the Parliament Acts. That could mean that the Parliament Act would have to be applied half a dozen times a

week or 10 times a year, which has not been the custom so far. Would that be practical?

Robert Rogers: If the circumstances arose. Of course, however many times the circumstances arose that fitted the requirements of the Parliament Act, the action could be taken, but we would be talking about a situation of disagreement and disharmony between the Houses that would have reached a very advanced stage, so a lot of other things would have to be taken into account. By your leave, Lord Chairman, we might come back to the question of primacy as potentially a legislative and indeed justiciable concept. As far as I know, this is the first time that this has been attempted in statute. That brings in a whole range of other factors.

Lord Trefgarne: The Parliament Act would seem to be a very blunt instrument if its primary purpose is to secure the primacy of the House of Commons in a situation where the Lords suddenly became largely elected and much more legitimate.

Robert Rogers: On the scenario that you put forward, it would be a resented instrument if it were blunt.

Lord Trefgarne: But that is the scenario in the Bill.

Q655 Baroness Shephard of Northwold: Mr Rogers, please could you expand on your anxiety about the representation of constituents—perhaps not anxiety, but the fact that you mentioned this as one of the three issues of concern you have about the Bill. You may or may not have been here to hear Mr Allen say that there would be a less legitimate relationship between the electorate and Members elected to a second Chamber. He was pressed on this by Lady Andrews and by Lady Symons. Last week,

we heard from Paul Murphy, who indeed has in his constituency Members of the Welsh Assembly—actually two sorts, elected by different methods. The impression that Mr Murphy gave us is that such elected people, and certainly electors, do not feel that there is a less legitimate relationship: a vote is a vote and if you have elected someone you expect them to do something for you. This seems to have been given the lie by Mr Allen for the reasons that he explained: he is so keen on getting at least part of the House of Lords elected that he is willing to put up with these inconveniences. Within the context of what I have set out, could we hear your reservations, or at least the points that you would like to make, about the representation of constituents?

Robert Rogers: I read Mr Murphy's evidence to the Committee. I was present for part of Mr Allen's evidence and I heard him say a "less intimate" relationship rather than a "less legitimate" relationship, but he may have said both.

Baroness Symons of Vernham Dean: I thought I heard "less legitimate".

Robert Rogers: Right. I certainly would not comment on legitimacy in this context. Less intimate, yes—the proposals somewhat dilute the relationship, perhaps. My concern is along the lines that, once one is elected to represent constituents, that is what one expects to do, in whatever revised circumstances might exist in a future House of Lords. So far as the House of Commons is concerned, and I must come back to the competition point that I made earlier, it seems inevitable that the House of Lords would not want, for example, to have opportunities to raise constituency issues. It has been said that it is expected that those issues would be of a bigger, broader

character—regional, economic issues and things of that sort. I doubt that, because hard cases come to individuals, and individual representatives then decide how they are going to raise them. I think that there would be proceedings which were related to constituency problems—perhaps the equivalent of the half-hour Adjournment Debate that we have at our end of the building. It might affect the sorts of Questions that Members wish to ask of Ministers. I am quite certain that Ministers would be signing a great many more letters than they do now on similar matters.

There is also an issue about people of different parties representing the same area. You can of course say that that can be the case with the devolved arrangements or indeed with Members of the European Parliament. But if one is talking about—if I can call it this—constituency case tourism, where one goes to the Member who one thinks is the most likely to give one a satisfactory outcome to a problem, I think there is scope for some confusion there. Certainly, the convention in the House of Commons—as I do not need to tell anybody round this table—is that Members are punctilious about not straying on to the territory of a neighbour whose first duty is to represent a constituent in that constituency. There might be issues there.

Q656 Mrs Laing: Mr Rogers, it is often said that the House of Lords, or a second Chamber, is a revising Chamber and that its main role is revision. Given what you said, particularly in answer to the last question, do you consider it possible that there might be danger of duplication of the work of the two Chambers, first, as you have just put it very well, in constituency and representative work, and, secondly, in the work of dealing with and examining legislation, the actual day-to-day Committees

and sittings? Is there a danger that the revising role currently held by the House of Lords would become a duplicated role, so that the two Chambers become more like each other?

Robert Rogers: Perhaps I can take the legislative point first. In any bicameral system where there is an Executive within Parliament, there is a tendency to use either House as a vehicle for government amendment. For example, in the 2007-08 Session, there were nearly 5,000 amendments tabled by the Government to their own Bills, but almost exactly half and half between the Lords and the Commons. Certainly, as we have seen with the handling of Bills in this unusually long legislative session, the Lords has taken a lot of time in Committee of the Whole House, on the Floor. I would not leave aside the concept that either House can be used as a vehicle for governmental second thoughts, however they emerge, whether as a result of criticism or undertaking or drafting on the hoof, which from our point of view is something that we would prefer not to see.

I take as the implication of your question the issue about Select Committees, which is at the moment a perfect example of complementarity. In the House of Commons, we have what one might call a vertical system of Select Committees: it drills down into each government department. In the House of Lords, there is a horizontal system of Select Committees: it looks across issues such as the constitution, economic affairs or communications. Again, with the financial element that we spoke about earlier, I would be not in the slightest bit surprised—indeed, I would expect it—if a House of Lords reformed or changed along the lines proposed wanted to have a direct handle

on the doings of individual departments. If that were to occur, we would have a lot of competition between the Lords Committee on X and the Commons Committee on X. I see a potential disadvantage for Parliament as a whole if that were to occur because, although it is fine when Committees agree on something, the Government of the day which was offered a menu of a Commons Committee supporting something and a Lords Committee criticising it—or the reverse—would have a very good excuse for dismissing the recommendations of both.

The Chairman: Lord Rooker, I have got you on my list but I am not sure whether you actually put your hand up.

Lord Rooker: Yes, I have had my hand up since 5 o'clock.

The Chairman: Everything comes to he who waits.

Q657 Lord Rooker: Richard, going back to your earlier comments, it is quite clear to me that you reckon that the status quo which this Bill envisages—in the relations between the two Houses and the way we work together—is unacceptable. You have a sense of foreboding in terms of clashes and having to write down the rules and revisit them. Let us look at the advantages and disadvantages. A resolution for the conventions is unenforceable. If you put the conventions into statute, that means that in effect that the Commons controls everything, because the Parliament Acts would have control over legislating the conventions into law. It would be making the conventions so we all know what they are and we all know what the rules are. The Commons is effectively setting up an elected second Chamber but would have total power. There is a dilemma in the status quo of doing nothing. It is very comfortable

at the moment, because Ministers can say, "Everything will be okay, we'll evolve". That is more or less what Graham Allen said. You foresee some difficulties in this respect. Which way would you jump in terms of getting the codification or legislation—those words are used interchangeably—with the conventions, so that we do not have these clashes between the two Houses, which will not serve anybody well.

Robert Rogers: I am not sure that I go all the way with your description of what I said earlier on. I think it takes me into a broader political arena in which I am not comfortable, but if we are now turning to the hazards of legislating, I think that there is a whole hierarchy of questions that you need to address. I think at least two of your Members were Members of the Joint Committee on Conventions—Lord Tyler and Baroness Symons. The Committee's very wise report came away from codification of conventions because the argument was that these are changing and the practice changes with them. I think that you can codify in some sort of exchange between the Houses. There was the very good example from not long ago of the concordat—if I can put it that way—on packaging of amendments to Bills between the two Houses. That in a sense was a sort of a codification. There was a Written Ministerial Statement—or a planted Question, as they were in those days—and it was quite clear what the two Houses had agreed as a matter of practice.

I think that, if you are talking about legislation, a great many undesirable consequences follow from that. If you start to regulate the internal processes of Parliament by legislation, there is only one way of deciding any difference and that is through the courts. It may take a fairly long time to decide something or resolve an

issue that the two Houses might well decide in parliamentary business overnight or in the course of a sitting day. Also, because the courts are going to have to look at parliamentary materials to come to a decision, that will drive a coach and horses through Article 9 of the Bill of Rights. That is an outcome about which I would be extremely concerned.

Q658 Lord Rooker: We are talking in the context of two elected Chambers—that is what we have to envisage. We have a second elected Chamber in a unitary state where effectively all the power stays in the first Chamber under the Parliaments Acts. We have our own internal debating rules and the Commons have theirs, but under this procedure the Commons could actually write, effectively, the Lords debating rules—what you can consider and how far you can consider it under the new arrangements. In that case, why should elected Members of the Lords, in a dispute with the Commons, not go to the courts? The courts are the arbiter. You could be an elected Member of the Lords and feel that the Commons keep bossing you about. You would think, "I am elected, the rules are like this, we want to do this, say that, or vote on this, but we cannot. I would rather let the courts decide." That is the minefield we are going into, is it not?

Robert Rogers: You very vividly put the idea of unelected judges deciding what it is that elected representatives may or may not do. That has clear hazards. I would be very concerned because that process means that you are regulating the proceedings of what should be a sovereign Parliament by reference to the operation of the law. Let us take, for example, the issue of primacy, which we mentioned a few moments

ago. That is quite carefully stated in Clause 2 of the Bill, because it says that nothing is to affect the primacy of the House of Commons. Of course this is the first time that the idea of primacy is proposed to be put in a statute, and so a whole series of questions are begged immediately. What does "primacy" mean? Let me just give you a cheeky example. Would it mean, for example, that on a Joint Committee such as this the will of the Commons Members should prevail, even if they were in a minority? You would say immediately, "No, of course not", but who is to determine that? You could argue that, if nothing in the Bill affects the primacy of the House of Commons, there must be a primacy there to be worked through. What is the extent of that primacy? As long as you put that concept in legislation, the only people who can tell you are the judges.

Q659 Lord Rooker: I have one more short question. Earlier on, Robert, you gave us a very good example about the certification of a money Bill. In the circumstances of doing nothing—that is, the status quo on conventions—who would certify to Mr Speaker that a Bill is a manifesto Bill? Who would give that advice to the Speaker, bearing in mind the precision by which manifestos are drafted by the political parties?

Robert Rogers: I think that you have just about answered your own question. It is not a job that I would eagerly undertake to give advice to the Speaker. Of course you can look at the manifesto and say, "What sort of congruence is there between this Bill and a fairly outline indication?" because of course you can follow through a principle but, in the detail with which you propose to implement it, you may subvert, change or substitute the effective elements of that principle. You could have some difficulty.

Lord Rooker: But that is the problem. One of the conventions deals with manifesto Bills. How do we get over this dilemma? Is there a special way that they are dealt with here? An elected Chamber may say no.

Robert Rogers: As long as you are non-codifying, it is like a camel—it may be quite hard to describe but, when you see it, you know what it is.

Q660 Gavin Barwell: At the start of your evidence, you gave us a very succinct phrase to describe the choice before us, saying that the current relationship is complementary and not competitive. In many areas of public policy, there is a view that competition actually improves the service that people get. I would be interested in your views on why that might not be the case in this situation. Let me take one specific example—you gave us three—in relation to Select Committees. You are quite right that the House of Commons Select Committees are mostly departmental ones, but until recently I sat on the Science and Technology Committee, for which there is an almost exact parallel in the House of Lords, and in my experience those two Select Committees certainly worked very well together. I am not sure, from the practical evidence we have, that that kind of competition would necessarily cause a problem.

Robert Rogers: My concern is not competition; it is duplication. I could give you a very good example of European financial instruments where there was quite a tussle between the Treasury Committee in the Commons and your Economic Affairs Committee in the Lords. I think that this is something where case law, despite your giving one example and my giving another, is at this stage not going to be that

helpful. One has got to stand back from a scenario and say, "Look, if it is like this, what are the likely outcomes?"

Q661 Lord Hennessy of Nympsfield: Robert, would I be right in thinking that when you state that—as I am sure is the case—this is the first time that the concept of primacy will have appeared on the face of a Bill, that already means that the crust is broken so that the judges' hands can go straight into the relationships between the two Houses, if the Bill proceeds as drafted?

Robert Rogers: There are several provisions in the Bill that would lead to a result like that, if its operation were challenged. Of course, that is the key proviso. Clause 58, for example, seems to be a good instance of specifying exclusions. If the proceedings of the House of Lords are not to be called into question for the reasons there stated, how, where and why may they be called into question? If we have a statutory provision that says that those provisions, with those savers, are not to be called into question, where does that leave the Commons, where we do not have a similar statutory protection? Of course, we say that the statutory protection is that of a sovereign Parliament protected by Article 9 of the Bill of the Rights, but the moment you start opening doors in, into and through Article 9, you have a problem.

Lord Hennessy of Nympsfield: If we wanted to make this Bill judge-proof—if we saw that as our function as a Joint Committee—what must we do? It is a big job to make this judge-proof as drafted.

Robert Rogers: I do not think that the courts like all-purpose ousters. I think that you will need to look for greater legal learning than I possess as to how one might do

that. My essay at an answer is that it would not be easy while preserving the effect of what is intended here.

Q662 Baroness Symons of Vernham Dean: Let me go back to one of the questions raised by Lady Shephard, on the relationship of the individual Member elected into the House of Lords being less intimate than the one in the House of Commons. I absolutely see that, if you have an electorate of 60,000, there will be a more intimate relationship with your MP than there would be if you have an electorate of 570,000, as I think the White Paper says for individual Members of the House of Lords. On the other hand, if you have been elected with the opportunity for 60,000 people to vote for you and someone else has been elected with the opportunity for over half a million to elect them, which would you say was the stronger mandate?

Robert Rogers: I can very happily and immediately tell you that you are taking me way out of my comfort zone. I am not going to try to answer that one.

Q663 Lord Trimble: You mention Select Committees being complementary and that that complementarity is vertical rather than horizontal. I have just come from spending over two hours in the Lords European Union Select Committee, which is horizontal. It covers exactly the same ground as that in the Commons but we do not clash because we do things differently. In other words, in the Lords, provided that we have people who have just come up from the Commons properly acculturated, we avoid political issues. I remember when we did a report on 10 years of the euro. We did that report and got complete unanimity in the Committee because we never

asked the question that they would start with in the Commons and never get past: whether the United Kingdom should join the euro. But that would change if you had elected Members. The political issues would come straight in. That is more of an observation than a question.

I will make my other observation quickly. You talked about people in the Commons being punctilious in abiding by the convention of not interfering in the constituencies of other Members. That might be the convention that exists in England, but it did not exist in Northern Ireland. In my time in the Commons in Northern Ireland, I would go every other week to hold meetings in other people's constituencies and do so in a very public way. I did that so that my party could be in competition with the party of the man who was then the Member of that area. That was just something he had to put up with.

Robert Rogers: I think that the European Union Committees are an example of complementarity because the House of Lords Committee does many fewer documents but in much greater depth and the House of Commons Committee reports on about 1,200 a year, finding that about 600 or 700 merit a substantive report. It is a perfect example of complementarity.

Lord Trimble: But it is unlikely to survive the arrival of elected Members.

The Chairman: I do not understand that. I do not want to intervene in the argument, but as a Member of the same Committee as Lord Trimble I just question the point that he made. Why does he say that?

Lord Trimble: We avoid what are called the political issues—the issues that would catch the imagination and attention of the public presently. That would not be the case were there elected Members.

The Chairman: Well, there we are. Thank you very much for coming. By the time we have finished this vote, the House of Commons will be into their vote, in which case we will non-quorate and not here. Thank you very much for coming. I thought that it was revealing and helpful.

Robert Rogers: I would be very happy, should the occasion arise, to assist you on matters of conciliation and the suggestion that it might be illegal to vote against the Second Reading of a government Bill in a reformed House of Lords. That may be for another occasion.

The Chairman: Thank you very much indeed.